

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 53 | Issue 4

Article 3

Summer 1978

The Lawyer and the Terrorist: Another Ethical Dilemma

F. Thomas Schornhorst

Indiana University Maurer School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Communications Law Commons](#), [Criminal Law Commons](#), [International Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Schornhorst, F. Thomas (1978) "The Lawyer and the Terrorist: Another Ethical Dilemma," *Indiana Law Journal*: Vol. 53 : Iss. 4 , Article 3.

Available at: <http://www.repository.law.indiana.edu/ilj/vol53/iss4/3>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

The Lawyer and the Terrorist: Another Ethical Dilemma

F. THOMAS SCHORNHORST*

No great insight is required to conclude that any consideration of the function of lawyers in the context of terrorism is paradoxical. Terrorism, among other things, involves the use of violently coercive means to achieve personal or political ends—the very means against which the Rule of Law is set. Though terroristic acts may be viewed as ultimate expressions of injustice, they occur because legal and peaceful methods of reaching the desired goals have been perceived by the actors as inadequate or because they have been rejected altogether. A person trained as a lawyer may provide guidance and protection for those who choose to stay or are brought within the complex structure that is the legal order. However employed, the lawyer's *raison d'être* is peaceful avoidance or resolution of disputes through a sometimes bitterly adversarial, but rationally-based system of law and legal institutions. Therefore he or she seems hardly the person whose peculiar talents would be in great demand once terrorists have converted plans to action.

But it may be because we are a society so accustomed to seeking aid, solace and leadership from our lawyers that we find some of them mobilized along with the SWAT teams and the bomb squads on occasions of hostage-taking acts of terrorism—where words rather than bullets and tear gas are the first order of business. A lawyer's ability and experience in negotiation may be valued in such instances, although persons more formally trained in human behavior may be better suited to that function.¹ Of greater importance would be a lawyer's advice to the authorities as to the limits of permissible force, lawful methods of acquiring and preserving evidence, and assuring due process of law to the hostage-taker(s) upon surrender or capture.

What has been said, so far contemplates the lawyer's intervention on behalf of the "good guys" or, at least, as a neutral observer. But what of the lawyer called into the situation by or on behalf of the lawbreaker?—or of the lawyer who assumes that role? To what extent, if at all, do any of the ethical rules or considerations that purport to describe both the obligations and the limits of lawyering apply? Even the most thoughtful and provocative examinations of the subject have left this specific problem unexplored.²

*Professor of Law, Indiana University

¹See generally, F. HACKER, *CRUSADERS, CRIMINALS, CRAZIES* (1976). Dr. Frederick F. Hacker is a psychiatrist who has written extensively on the problems of international terrorism.

²See, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060

A recent, personal experience with lawyers who either unwillingly or unwittingly found themselves faced with choices dictated by these hard questions has provoked this attempt to analyze the issue.³

THE CASE OF ANTHONY G. KIRITSIS⁴

The Abduction

At the start of the business day of February 8, 1977, Anthony G. "Tony" Kiritsis paid the last of his many visits to the fourth floor offices of the Meridian Mortgage Company in Indianapolis, Indiana. He had been there dozens of times during the past four years to discuss with M. L. Hall, the head of the company, and his son, Richard, his hopes and plans for the commercial development of a 17-acre tract of land on the west side of Indianapolis. The \$130,000 mortgage on the land was due on March 1, 1977, and Meridian, having already extended Kiritsis' promissory note for two years beyond its original due date, had told him there could not be another extension. The debt was to be paid or the mortgage would be foreclosed. Kiritsis had on this day neither the money nor prospects and had resolved to take action of a different sort.

The company receptionist, a temporary employee filling in for an absent worker, perceived no threat from the rather curious little man in his mid-forties who wore only a cardigan sweater against the cold and windy day. His left arm was thrust into a blue sling looped around his neck, and in his free arm he carried what appeared to be rolled up plans or blueprints and a cardboard suitcase from a local department store. He asked first to see the senior Mr. Hall, and being told that he was wintering in Florida, asked to see his son, Richard. Richard was not yet in the office, but was expected shortly. Kiritsis and the receptionist chatted until he arrived.

When he came in Richard Hall noticed Kiritsis and invited him to join him in his father's office. He was not surprised to see him there. Some days earlier Kiritsis had asked that a pay-off statement be prepared. Hall, also noting the rolled up plans, anticipated that their discussion would involve the payment of the mortgage and more on the development of Kiritsis' real estate. During the past four years Hall had sat in on many discussions between Kiritsis and his father, M. L. Hall, concerning proposed development of

(1976). For a critical appraisal of Freedman's book, see Rotunda, Book Review, 89 HARV. L. REV. 622 (1976).

³While on a sabbatical leave from Indiana University School of Law in 1976-77, I served as a Deputy Prosecutor in Marion County, Indiana (Indianapolis). During that period I was one of the prosecutors assigned to the case of State v. Anthony G. Kiritsis, CR77-44A, Marion County Criminal Court, filed Feb. 14, 1977. The observations I make in this article are based upon my experience in that case.

⁴The narrative of the events is based upon the testimony and exhibits that were introduced during lengthy pretrial hearings and during the trial itself. Footnotes referring to specific sources will be used only when direct or indirect quotations are taken from available transcripts.

the ground. Over that time he had come to regard Kirtisis as an intense, emotional and suspicious person whose business talents fell considerably short of those required to put together successfully the kind of land development deal that was his dream.⁵ Hall was pleased not only at the prospect of the repayment of the money that his company was owed, but also at the departure of a problem client.

Inside the office, only a few steps away from the reception area, Kirtisis made a curious request. "Dick, do you mind if I close the door? My shorts are killing me and I want to adjust them." Hall told him to go ahead and turned his attention to some papers on the desk. A few seconds later he looked up to see Kirtisis facing him. The sling had been removed from his arm and a handgun was aimed at Hall's chest.⁶ Hall was ordered to remove his coat and tie and to sit in the chair with his back to Kirtisis. From the suitcase came a sawed-off .12 gauge shotgun. A cable loop that had been attached to the forward end of the gun was slipped over Hall's head and tightened around his neck. The stock of the gun had been sawed-off and shaped like a pistol grip. A cable attached to the trigger led through a hole drilled in the rear of the trigger guard, and formed another loop that Kirtisis placed around his own neck.

A Telephone Call and the Walk Down Washington Street

Kirtisis reached for the telephone and dialed 911, the police emergency number. When the dispatcher answered, he was ready with his instructions:

[N]ow I want you to send two police officers to this address and I'll tell you what you can tell them, I've got a twelve guage sawed off automatic shotgun, I've got a dead man's line on the trigger, there's three shells in the fucking gun, there's one in the chamber and a man with the gun on his neck, wrapped around it with a cable that's holding the fucking safety in his hand and if anybody yanks on me, yanks the gun, makes a false fucking move, he will die right here, now I know they'll do anything to save this man's life, because everybody thinks I'm, they are going to think that I'm a [mad] man, me a deranged mother fucker, well I ain't, I'm mad at these mother fuckers trying to take everything that I've got. . . .⁷

⁵At trial the defense, supported by psychiatric testimony, made much of the point that Kirtisis had for the four years preceding these events devoted his entire energy to the development of a shopping center on his land. A series of defense witnesses (relations and friends of Kirtisis) testified that "his land was his life." Several psychiatrists who had examined Kirtisis testified that Kirtisis claimed to have had a "vision" of himself dead on March 1, 1977, and that he seemed to equate the foreclosure of the mortgage with the taking of his life. He also told the examining doctors that he thought the Halls had Mafia connections [which, of course, they did not] and that they were going to have him killed. His action against them, he claimed, was a kind of pre-emptive self-defense.

⁶Kirtisis had been planning his move for a long time. Some days earlier he paid a visit to the Halls' office with his arm in a sling and explained to Richard Hall that he was to have an operation on his arm. This, he later told psychiatrists, was to throw them off guard. The sling also provided a convenient place for concealing a handgun.

⁷The quotation is from transcription of tape recordings that the Indianapolis police routinely make of 911 emergency calls. .

The conversation continued in a similar vein for over half an hour. Kiritsis was trying to make sure that no one would interfere with him as he, according to his plan, moved his hostage from the office to his apartment a few miles to the west. He demanded a car and warned repeatedly that if anyone tried to shoot or capture him the rig on the shotgun would cause it to discharge and kill Richard Hall. When it appeared that the police did not intend to send anyone into the office, Kiritsis, with the shotgun attached, ordered Hall to move to the stairway. They walked down four flights of stairs, through a narrow lobby and out onto the sidewalk of Market Street—barely a block away from the City-County Building that housed Police Headquarters and the Criminal Courts. The temperature on a nearby bank thermometer read 11 F. Both men were in their shirtsleeves.

The scenes filmed from this point on by television news cameramen must surely make the abduction one of the most memorable in criminal history. Flanked by straggling columns of incredulous and helpless police officers, Kiritsis marched his hostage to a nearby parking garage in an unsuccessful attempt to commandeer a vehicle. Announcing to his hostage they would "walk the seven miles" he then headed Hall to the west along Washington Street—a major Indianapolis thoroughfare. For four blocks Kiritsis kept up a string of threats and epithets directed at his victim and at the police officers around him. At one point he became so angry he jerked Hall around, the cable attached to the shotgun cutting into his neck. Hall slipped on some ice and began to fall. Kiritsis flexed his knees to go down with him and later wondered why the gun did not go off.

A block further on he encountered a police car stopped at an intersection. Kiritsis forced the driver out of the car, took a pair of handcuffs from another officer, got into the front seat of the car from the left side and pulled Hall into the driver's seat. He directed Hall to drive to his apartment in the Crestwood Village complex on the west side of Indianapolis.

Once inside the apartment, Hall was handcuffed, chained to a heavy metal weight and locked inside the bathroom. All over the apartment were placed strings with keys attached at various places. Kiritsis would later warn the authorities outside that this was all part of an intricate detonating device that would cause the apartment to blow up should any attempt be made to enter forcibly through a door or window. He was taken at his word.⁸

⁸Kiritsis was reported to be familiar with explosives and the police heard rumors about his having recently acquired an amount of dynamite. However, the explosives later found in his apartment were two one-gallon wine jugs filled with gasoline. Although he dismantled his detonating device before leaving his apartment, he apparently had rigged a metal weight to drop on the jugs, break the glass and release the gasoline. The gasoline fumes would have been ignited by the flame of a candle. Also he could have broken the bottles by shooting through them.

Enter the Lawyers

As the various police agencies⁹ began to set up for what was to be a 63-hour stand off, a conference telephone call to Kiritsis was arranged by a deputy sheriff, a personal friend.¹⁰ Participating in the conversation with Kiritsis were Indianapolis Chief of Police Eugene Gallagher, Marion County Sheriff Larry Broderick, Kiritsis' brother, Jimmy, and his half-brother, George Urgo. The brothers had been summoned hurriedly after Kiritsis revealed his identity to the police dispatcher during his call from Hall's office.

During this conversation the authorities began to understand the abductor's motivation and his demands. He believed that Hall's mortgage company was out to get his land; that they had misused confidential information he had given them; had tried to attract his own prospects to other sites in which they had a financial interest; and had actively discouraged potential tenants and other financial institutions from doing business with him. Because of this alleged deceit he was unable to pay off his mortgage.¹¹ In exchange for Hall's life he had to be assured of the following:

1. He was not to be "arrested, booked, fingerprinted, mugged", he was not to be made to spend any time in jail; and was not to be required to see a psychiatrist.
2. The mortgage company was to admit all the wrongs they had done to him (he refused to be more specific because "they", the mortgage company, would know what the wrongs were).
3. He was to be paid appropriate damages for his lost profits (his deals, he claimed, were worth millions).
4. He was to be indemnified by the mortgage company for any civil liability that might flow from his acts (he was worried that, among other things, someone may have suffered a heart attack while witnessing the abduction).

Given the discussion about documents, damages and other legal sounding claims it was only logical that the conversation turned to lawyers and "legal representation" for Kiritsis. Both Urgo and Chief Gallagher pressed Kiritsis for the names of lawyers whom he would want to represent him. From this discussion emerged the names of two lawyers, John C. Ruckelshaus and Charles Wilson, who had in the past represented or advised Kiritsis in civil

⁹At the scene were units from the Indianapolis Police Department, Marion County Sheriff's Department, and Indiana State Police. Also involved at one time or another were federal agents from the FBI and the Department of the Treasury (Alcohol, Tobacco, Firearms Division).

¹⁰Kiritsis had over the years cultivated several friends in the various local police agencies. A number of these police friends later testified in support of Kiritsis' insanity defense.

¹¹During the course of the trial it was established that the mortgage company was guilty of no wrongdoing with regard to Kiritsis.

matters and in whom he apparently had trust. Upon completion of this conversation, and in anticipation of dealing with Kiritsis' lawyers, the police called the Marion County Prosecutors Office to summon up legal reinforcements. Quickly three deputy prosecutors were brought into the case. They were David Rimstidt, the Chief Deputy (who, as it happened, was the ranking prosecutor available because the Prosecutor, James Kelley, was attending a conference in California), George Martz, a seasoned trial deputy, and Robert Thompson, the deputy in charge of the felony screening division.

In the meantime the Sheriff telephoned Wilson, described to him the situation and the just concluded conversation with Kiritsis, and asked him to establish contact with his former client.¹² Chief Gallagher conveyed the same message to Ruckelshaus. Wilson and Ruckelshaus quickly got together and a division of labor soon evolved. By 4:00 p.m. on the day of the kidnapping Kiritsis had on line his "criminal lawyer" (Ruckelshaus) and his "civil lawyer" (Wilson).

Negotiations and the Emergence of Adversarial Roles

A Question of Immunity.

First, and seemingly foremost, was Kiritsis' demand that he suffer no legal consequences for his actions with regard to Hall. This came to be referred to as a demand for "immunity" although in technical legal terms it is more accurately viewed as a demand seeking a promise of no prosecution.¹³ The authorities conducting the negotiations realized that if they started the discussion at this point it could quickly lead to impasse and increase the risk of precipitate and violent reaction. With this in mind they concentrated throughout the balance of Tuesday, February 8, and for most of the next day, on Kiritsis' complaints against the mortgage company. By Wednesday afternoon Chief Gallagher, who had been frequently on the telephone with Kiritsis, was beginning to discern some progress. The mortgage company had issued a public apology for whatever wrongs they had done him, and Kiritsis had been able to hear his own rambling complaints against the mortgage company aired by a local radio station.¹⁴

In the meantime, deputy prosecutors had set to work drafting an "immunity agreement" which, according to them, was to be employed as the

¹²Wilson called Kiritsis and confirmed his demands. When he asked Kiritsis if he also wanted the mortgage on his land released Kiritsis said no, because it was not one of his demands. ". . . I am Tony Kiritsis and I'll pay my obligation when it becomes due." Transcript of Hearing on Defendant's Motion to Dismiss Information, *State v. Anthony G. Kiritsis*, CR77-44A, at 646 (Marion County Crim. Ct., April 1, 1977) [hereinafter cited as Hearing Transcript].

¹³Immunity under Indiana law may be granted only by a court upon the request of a prosecutor in situations where a witness in a criminal proceeding lawfully claims a privilege against self-incrimination. IND. CODE § 35-6-3-1 (1976). For a discussion of non-statutory forms of immunity, see Comment, 65 J. CRIM. L. & CRIM. 334 (1974).

¹⁴On the day of the abduction Kiritsis called Fred Heckman, news director of radio station WIBC. Heckman, with Kiritsis' eager cooperation, taped their lengthy conversations and broadcast parts of them.

final hole card in case of a life or death showdown. A telephone conversation on Wednesday between Deputy Prosecutor George Martz, Kiritsis, Ruckelshaus and Wilson, led them to the conclusion that the demand for immunity was "non-negotiable." Both lawyers told Martz that, given their knowledge of their client, he would accept nothing less. Martz stalled for time saying that no action could be taken along these lines until cleared by Prosecutor Kelley who was still in California. In fact Kelley and his deputies had been in frequent telephone contact prior to this meeting, and Kelley had approved of the plan to offer Kiritsis immunity should, in the judgment of the deputies at the scene, it be necessary to save Hall's life. The prosecutors also had agreed at this point that they would not consider themselves bound by any such promise if given.

Although both the prosecutors and the private attorneys had as their main objective the prevention of harm to the hostage, the latter clearly were feeling tugs of loyalty to their client.¹⁵

A Crisis, A Lie and a Bluff.

Late Wednesday afternoon, February 9, the police and the prosecutors had to turn their hole card. Kiritsis heard a radio broadcast from an on-the-scene reporter that the bomb squad was readying some mats and other equipment, and that this might signal an attempt to break through the walls of the apartment, capture Kiritsis and rescue Hall.¹⁶ Kiritsis was infuriated. According to Hall, he became angrier than he had been during the abduction itself. He was on the brink of losing control. During that day Kiritsis' brothers, a friend, and some police acquaintances had been staying in an apartment across the hall and had been communicating with him through the door. Now he screamed at them to get out because he was going to blow up the building. They left.

There followed in quick succession a series of telephone calls. First Kiritsis called Gallagher at the police command post cursing and claiming that he was going to blow up the building and kill Hall. He demanded that Gallagher come to the apartment that his brothers had just vacated and slammed the receiver down. Attempts by Gallagher to call him back and calm him down were unsuccessful. Then, at the urging of the police, Fred

¹⁵For Ruckelshaus, a partisan attitude toward the prosecutors was perhaps inevitable. He had for several months been representing a number of Indianapolis police officers who, through the efforts of Prosecutor Kelley, had been charged with perjury, accepting bribes and other acts of corruption. The prosecutors were his natural and none-too-friendly adversaries. Wilson, on the other hand, specialized in real estate transactions, and the rough and tumble world of the criminal lawyer was foreign to him. With this in mind, Wilson stayed in the background as the immunity matter was discussed. His turn was to come the following day when the negotiations turned to "damages" in the millions of dollars.

¹⁶The report came from Doug O'Brien, the WIBC news reporter on the scene.

Heckman, the news director of WIBC radio station who had taped and aired previous telephone conversations with Kiritzis, and who seemed to have developed a friendly rapport with him, attempted also to call and calm him down. He too got nothing but threats and curses.

Back at the command post the worried police and prosecutors felt they had to do something—give Kiritzis something. They consulted a psychiatrist who had been helping them monitor the situation and who had heard Kiritzis' outbursts. It was possible, he said, that Kiritzis was losing control and was at that point homicidal. The prosecutors, Rimstidt and Thompson,¹⁷ and Chief Gallagher quickly concluded that the time for tendering the immunity agreement had come—if they waited any longer it could be too late.

Gallagher called Kiritzis and told him the authorities were ready to discuss immunity.¹⁸ Kiritzis, still highly emotional, refused to discuss it. At this point "Dutch" Sheffer, an old friend of Kiritzis who had been among those in the apartment across the hall, offered to call and tell him about the immunity. His friend's voice had the desired calming effect and he read the immunity agreement to Kiritzis telling him that "it was the most legal looking document" he had ever seen. Ever the suspicious negotiator, Kiritzis ordered the document to be delivered to his attorneys and said that he would discuss it with them in the morning. With the storm apparently weathered, everyone settled down to wait.¹⁹

The following morning there was an awkward meeting between Deputy Prosecutor Rimstidt, Ruckelshaus, and Wilson. They had gathered in Wilson's office to review the immunity agreement that had been promised to Kiritzis. At the outset Rimstidt asked each attorney whether he regarded Kiritzis as his client, and each assured him that he did. This inquiry, according to Rimstidt's later testimony, was to determine how candid he could be concerning the prosecutors' plans. Having concluded earlier that such a promise would be unenforceable at law, Kelley and his deputies decided that if the tender of immunity became necessary it would be offered only as a ploy—a ruse to get Kiritzis to come out and release his hostage.²⁰ Rimstidt's

¹⁷At this crucial point the third and most experienced deputy prosecutor, George Martz, was on his way to the airport to meet and brief an FBI expert on crisis intervention whose services had been requested by local authorities.

¹⁸Hearing Transcript at 139-40.

¹⁹The danger to the hostage at this point was greater than anyone on the outside realized. Kiritzis took Hall from the bathroom and reattached the shotgun with its "dead man's cable" around his own and Hall's neck. The two then sat at a table through most of the night. Hall testified later that he feared that either Kiritzis or he would doze off causing the gun to fire.

²⁰On the rare occasions when courts have had to deal with attempts to enforce promises of immunity obtained through terroristic threats they have agreed that such promises are unenforceable. In *United States v. Gorham*, 523 F.2d 1099 (D.C. Cir. 1975), and *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), the defendants were prisoners in the District of Columbia jail who had attempted an armed escape. In the course of the attempt they took several guards as hostages and later took as a hostage the D.C. Corrections Director, Kenneth Hardy. The hostages were abused physically and used as shields when the prisoners tried unsuccessfully to force authorities to open the outside gates. During the course of his confinement, Hardy was

problem now was whether to carry the deception through with Wilson and Ruckelshaus. He had learned enough about Kiritsis' personality in the preceding two days to conclude that either withdrawal of the immunity, or revealing its false nature, would trigger yet another enraged outburst and its attendant homicidal risks. If these men were really Kiritsis' lawyers, he felt that he could not risk giving the plan away to them because, if he did, they may have felt obligated to tell their client. And this is exactly what would have happened, according to Ruckelshaus:

Prosecutor: Now if George Martz, or any of the people in the Command Post had told you prior to the defendant's apprehension that the immunity agreement would not be honored, would you have passed that information on to your client?

Ruckelshaus: They know damn well I would have . . . and that's exactly . . . why . . . They know if they'd told me what they were going to do I would have told him.²¹

As he read the document Ruckelshaus noted that it covered only acts committed on February 8th and 9th. Since it was now the 10th, and the hostage had not been released, he suggested an amendment to include the 10th. Rimstidt agreed readily.

Ruckelshaus then applied the pressure. Looking Rimstidt directly in the eye and pointing his finger at him Ruckelshaus said, "now you're not going to

forced to sign a promise that he would undertake no reprisals or legal action against inmates involved in the uprising.

Having later been convicted of several serious felonies committed during the attempted escape, a number of the prisoners invoked the theory of *Santobello v. New York*, 404 U.S. 257 (1971), and sought reversal of their convictions arguing that Hardy, as agent for the United States Attorney, had granted them immunity from prosecution. The court's response to this argument was:

. . . (T)he decision in *Santobello* on which appellants would rely involved fundamental principles of contract law, notably those concerning mutually binding promises freely given in exchange for valid consideration. These factors were not present in Hardy's "negotiations" with the rebellious inmates. The prisoner's tacit guarantee that no further violence would ensue promised only the performance of a pre-existing duty, a typical example of invalid consideration. The promise Hardy offered in exchange was secured through the most patent sort of duress and thus was voidable. Were his agreement to be construed as an absolute immunization of appellants from prosecution, it would be contrary to public policy and nudum pactum.

523 F.2d at 1109-10. Similarly, the defendants in *State v. Rollin*, 359 A.2d 315 (R.I. 1976), relied on a promise of immunity from prosecution given to rebellious state prison inmates by the Rhode Island Director of Corrections. The promise was made upon the inmates' threat to kill a hostage they had taken during the uprising unless their demands for immunity and other concessions were granted. Rejecting this argument, the court stated:

Promises extorted through violence and coercion are no promises at all; they are void from the beginning and unenforceable as a matter of public policy.

. . . We conclude our consideration of this issue by stating that even if the director had the power to make the alleged promises, they would be unenforceable as a matter of public policy because they were secured by violence and coercion.

Id. at 318.

²¹Hearing Transcript at 599.

piss backwards on this are you?"²² As Ruckelshaus described the scene in court, Rimstidt made a "few squirms and turns" and he followed up, "now do you know what I mean by that? That you are not going to dishonor this but you're going to live up to it?" He said, 'yes.'"²³ Apparently the subject was dropped at that point without discussion of other things that might have been of interest to lawyers such as (1) the authority of the prosecutors to agree to such terms; (2) whether a court might later declare the agreement void as a matter of public policy and even appoint a special prosecutor; and (3) the impact of duress upon the validity of the promise and of the assurances that it would be honored.

To paint the prosecutors further into a corner, Ruckelshaus stipulated a condition not demanded by Kiritsis: that George Martz go on live television "at a prearranged time with Toni [sic] . . . where he would reaffirm the validity of the written immunity which Toni [sic] had then seen and would also state that they would continue to honor in the future."²⁴ This stipulation was requested, Ruckelshaus said, in order to assure his client of the existence of the promises, "I told them that it was legal if they continued to live up to it, and then I wanted them as a proof of their sincerity to tell Toni [sic] that publically [sic], and whoever else was looking on TV. . . ."²⁵

As indicated by this excerpt Ruckelshaus had become not only an adviser, but an advocate for Kiritsis. Later on Thursday, as the end of the crisis drew near, he continued in the same role. Kiritsis, with his supposed immunity from prosecution by the state safely tucked away, raised for the first time the question of federal immunity.²⁶ This sent the prosecutors scurrying to the telephone in an unsuccessful attempt to contact someone at some level in the federal government who could provide such an assurance. Ruckelshaus testified that he would not advise Kiritsis that federal immunity was valid "unless we have the same conditions that we did with the [state], and that is we have a federal man get on [TV] and say, yes it is valid, and yes it will be lived up to."²⁷ When someone half-seriously suggested that one of the local prosecutors go on TV purporting to be an Assistant United States Attorney offering Kiritsis federal immunity, Ruckelshaus objected vehemently indicating that he would reveal such a scheme to his client.²⁸ Because of intervening events²⁹ the question of federal immunity was dropped and was not a factor in bringing the episode to a close.

²²*Id.* at 547.

²³*Id.* at 548.

²⁴*Id.* at 554.

²⁵*Id.*

²⁶Kiritsis apparently was sophisticated enough legally to know that had he violated federal law by possessing a sawed-off shotgun. See 26 U.S.C. § 5861 (c) (1970).

²⁷Hearing Transcript at 558.

²⁸*Id.* at 559.

²⁹Late on Thursday, February 11, Kiritsis received a document prepared by the mortgage company representatives that "confessed" to the wrongs Kiritsis claimed to have been done to

A New Round of Negotiation—Wilson Picks Up the Ball.

As the third day of the abduction wore into evening and as the immunity issue seemed to have been resolved, Kiritsis demanded a more specific confession by the mortgage company of the wrongs they had done to him. Representatives of the company set to work developing such a list based upon the various claims Kiritsis had been making over the past two and one-half days. He called upon Wilson and through him began negotiating for the damages that he claimed were due him because of the mortgage company's interference with his business prospects. Failing in his attempt to get the mortgage company officers to name a figure, Kiritsis started the bidding at \$12 million.

Although Wilson would later describe his actions in the ensuing negotiations as those of an "errand boy"—i.e., conveying offers and counteroffers between Kiritsis and the Meridian executives he, too, assumed to some extent the role of advocate. When one of the company representatives (another lawyer) proposed a payment of \$3,000 to \$4,000, Wilson characterized the offer as "ridiculous and not [in] keeping with what I thought Tony had in mind."³⁰ Finally, through a series of telephone calls, which included some ludicrous discussions of tax liability and attorneys fees,³¹ Kiritsis, through Wilson, agreed to accept \$5 million, but only after having been warned that the company was worth no more than that.

Just as Ruckelshaus had structured the immunity issue so as to make it difficult (or at least embarrassing) for the state to back down, Wilson attempted to preserve a legal position for his client with respect to this transaction. Note the following exchange between Kiritsis and Wilson:³²

Kiritsis (K): In your opinion, sir, was that note as good as some of the paper we see around here right now? [Referring to papers strewn about counsel table].

Wilson (W): Well frankly—you're asking me for my current opinion as to its validity?

K: Your professional opinion, you're an attorney, sir.

W: As to its validity?

K: Yes sir.

W: Well I doubt very seriously if it is [valid]—I know it would not be honored without a certain amount of contest on behalf of the maker of the

him. According to Hall, this document so infuriated Kiritsis that he came out and held the "news conference" described in the text at 690-91, *infra*.

³⁰Hearing Transcript at 656. Wilson felt that such a low offer would further infuriate Kiritsis. *Id.* at 785.

³¹*Id.* at 661-62, 787. Wilson testified that he felt Kiritsis wanted to know how much he would net out of the deal. *Id.* at 663. Neither Wilson nor Ruckelshaus were serious about the fee that Kiritsis was willing to pay (five percent of \$5 million or \$250,000 each).

³²Kiritsis had been allowed to enter his appearance and act as co-counsel during the pre-trial hearings. In his questioning of Ruckelshaus and Wilson, Kiritsis revealed his belief that they were a part of the "conspiracy" to lie to him. During the latter stages of this hearing, Kiritsis and his then attorney, Owen Mullen, developed irreconcilable differences and Mullen withdrew from the case.

note obviously. In the context of or in the course of the negotiation, consistent with what we saw then as appropriate action, we tried to develop the thought that you had agreed to come down and to release this man, so that the idea of duress was no longer a factor . . . So I don't have an opinion as to whether or not it is valid. My thought then and my thought still is that—question of its validity terms and whether or not it was still then under duress [sic]. And that's the question of fact for a Judge to decide, not me.³³

With the matter of "damages" seemingly settled, Kiritsis appeared ready to come out. In telephone conversations with Chief Gallagher he agreed to leave his shotgun in the apartment, bring Hall down the stairs and deliver him to Gallagher at the landing. A car was to be waiting for Kiritsis to take him to his brother's home. At about 10:00 p.m. Kiritsis came out, but the shotgun was fastened around Hall's neck as it had been on the morning of the abduction. The "dead man's cable" was in place around Kiritsis' neck.

He marched Hall straight to the lobby of the apartment building where the police had their command post. The room quickly filled with news photographers, TV cameramen, reporters and policemen. Yelling at them to "get the cameras rolling" Kiritsis embarked upon a 40-plus minute wild-eyed, obscenity-laden diatribe during which he alternately poked and menaced Hall with the shotgun and shed tears of self-pity. Once again the police stood by helplessly as this incredible display was televised live, in living color and in prime time.³⁴

Throughout this "news conference" Kiritsis made repeated demands for the "agreement" to be delivered to him. Wilson testified, "There was a great deal of speculation as to what agreement was being referred to. And someone said, draft the note. So in the confusion I drafted a note"³⁵ for \$5 million payable to Kiritsis. And as Kiritsis continued his televised display amidst growing feelings of horror that he might either intentionally or accidentally discharge the shotgun pressed into Hall's neck, Wilson frantically searched for a mortgage company officer to sign the note.

His own testimony best describes this sequence:

Q. . . . [W]ell who signed the promissory note, finally?

A. Signed? Well I'd set it up as I drafted it, in anticipation of having it signed by Jerry Gowen who was known to be a high mortgage officer and by Art Northrup [an attorney who apparently was representing the company]. Unfortunately we could not find those individuals to sign it. And [the] Police Chief [Gallagher] grabbed it and signed Arthur Northrup's signature . . . and wanted to sign Jerry Gowen's signature.

Q: He signed both names?

A: No. He wanted to sign the other name as well and Ruckelshaus and I would not let him do so.

³³Hearing Transcript at 664-65.

³⁴For a discussion of the role of the media in this context, see Jaehnig, *Journalists and Terrorism: Captives of the Libertarian Tradition*, 53 IND. L.J. ____ (1978).

³⁵Hearing Transcript at 660.

Q. Who eventually did sign [the other signature]?

A: Well we looked high and low for an officer of Meridan Mortgage and were not able to find one. . . . And finding no one we looked upon a minor officer, whose name I frankly forget, within Meridian Mortgage and asked him to sign the note on behalf of Meridian Mortgage, which he did.

Q: The question of his authority as to do so being somewhat questionable?

A: Well he did a certain amount of hemming and hawing about his authority. And we said to him at the time, no one's forcing you to do it, if you want to do it fine, if you don't want to do it that's fine also.

Q: And what was your purpose in—actually you were . . . out seeking signatures?

A: That's correct.

Q: You wanted to be able to hand this note to Tony?

A: I wanted to be able to hand him the note signed by an officer of Meridian Mortgage, yes sir.³⁶

By this time Kiritsis had concluded his performance before the cameras and had taken Hall to another room in the building to await delivery of the note. When he received it he carefully removed the shotgun rig from Hall's neck, went to the window and fired it into the air. "I've been wanting to fire that thing for three days," he said.

Hall was safe; Kiritsis was arrested; and the immunity agreement was immediately repudiated by the prosecutors. Eight months later Kiritsis was tried on charges of kidnapping, armed robbery³⁷ and armed extortion. After two and one-half weeks of trial followed by two and one-half days of deliberation, a jury found him not guilty by reason of insanity.

But what should be the verdict with regard to the lawyers? Were the prosecutors guilty of unconscionable conduct in their calculated deception regarding immunity? Regardless of the outcome, did either Ruckelshaus or Wilson, or both, exceed the "bounds of the law" in their representation of Kiritsis? These problems will be examined in Part III of this article after a brief examination of a similar problem.

A BASIS FOR COMPARISON—ATTORNEYS AT ATTICA

The Kiritsis case is analogous to the problems faced during the 1971 prison uprising at Attica, New York, although there are obvious differences apart from the sheer magnitude of the two events. Attica was not the result of a carefully planned scheme hatched by a diseased mind with motives of revenge and greed, but developed spontaneously and was related to very real injustices within the American penal system. Those events have been carefully documented and insightfully described elsewhere.³⁸ However, quite

³⁶*Id.* at 657-59.

³⁷The armed robbery charge was based on Kiritsis' forcible taking of a police car on the morning of the abduction. *See* p. 682 *supra*.

³⁸*See generally*, REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972) [hereinafter cited as COMMISSION REPORT]; T. WICKER, A TIME TO DIE (1975) [hereinafter cited as WICKER].

similar in kind (but not in outcome) were the inmates' use of hostages as leverage for their demands, the centrality among those demands of freedom from criminal prosecutions (in their terms "amnesty"), and the roles of two lawyers and a local prosecutor with respect to that crucial issue.³⁹

When inmates took control of portions of the New York penal facility at Attica on September 9, 1971, and secured that control with hostage prison employees, Herman Schwartz' offer to assist in the resolution of the problem was quickly accepted by Commissioner of Corrections Russell G. Oswald.⁴⁰ Schwartz was a lawyer and a law professor from Buffalo and had provided free legal services for a number of Attica inmates. Also, he had for years been an active and successful proponent of prison law reform. He felt, as did Oswald, that he could be trusted by both sides and therefore be an effective mediator. Schwartz, along with New York Assemblyman Arthur O. Eve, were the first outsiders to enter the prison's D-yard, the stronghold of the rebellious inmates. They received the prisoners' "immediate demands" that included: (1) "complete amnesty" meaning "freedom for all and from all physical, mental and legal reprisals;" (2) transportation to a "non-imperialistic" country; (3) the intervention of federal authorities; (4) reconstruction of the prison "done by inmates and/or inmates supervision"; (5) immediate negotiation through several named or described persons, including attorney "Wm. M. Kunstler"; and (6) negotiations to be carried out in the prisoners' "domain."⁴¹

When Schwartz indicated that some of their demands (federal takeover, flight from the country) were unrealistic, and suggested that more practical ones be submitted, the inmate crowd turned ugly and "Eve had to jump to his defense, citing Schwartz record on behalf of inmates."⁴² Schwartz was to make three more visits to the yard that day. As to his third visit, in the company of Commissioner Oswald, Schwartz testified:

"I saw it as a negotiating session. We could now get down to the business of hammering out demands and trying to refine things in the way that I, in a conventional lawyer's way, you meet together, you start negotiating. [But] there was a lot of speech making and it confirmed to me, in my judgment later, that what we were really facing here was not a negotiating session such as in the labor-management context or anything like that, but between two sovereign entities who had a deep hatred and distrust for each other."⁴³

During a later session that day Schwartz' attempt to stem the inmate rhetoric and get to "meaningful" discussions caused a sharp decline in his credibility with the inmates. However, he and Oswald did come away with a

³⁹There were several other lawyers who played important roles at Attica as part of the Observers Committee or as representatives of the State of New York. However, their particular activities did not raise any of the questions that are explored in this article.

⁴⁰COMMISSION REPORT at 216-17.

⁴¹*Id.* at 205.

⁴²*Id.* at 218.

⁴³*Id.* at 222.

supplementary list of the inmates' "practical proposals" dealing with matters such as prison wages, religious freedom, censorship, parole, medical care, food, recreation, training of correction officers, inmate governance and political activities.⁴⁴

During the fourth visit to D-yard at about 7:30 p.m. on the day of the uprising, Schwartz agreed to seek on behalf of the prisoners, and with the consent of Oswald, a federal court injunction against "physical or other administrative reprisals against any inmates participating in the disturbance at the Attica Correctional Facility on September 9, 1971."⁴⁵ Schwartz explained to the inmates that the federal courts could not, under the circumstances, enjoin future state criminal prosecutions that might develop out of the takeover. Schwartz, having drafted the injunction in collaboration with one of the inmate "jailhouse lawyers," took off on a weather plagued trip to Vermont where the District Court judge having jurisdiction was attending a conference with other area federal judges. He returned at 6:30 the following morning with the signed federal court order.⁴⁶ But his efforts were for naught. Inmates, afraid of being tricked, claimed the order was not valid because it lacked a seal. Moreover, it referred only to the events of the 9th, and it was now the 10th. Schwartz vainly attempted to explain to the skeptical inmates that a seal was unnecessary and that the order easily could be amended to include the current date. Finally, during Schwartz' fifth and final visit to D-yard, "one of the 'inmate lawyers' grabbed the microphone and said, 'This injunction is garbage. It doesn't give us criminal amnesty, it's limited to only one day, and it doesn't have a seal.' With that, in full view of the hundreds of assembled inmates, he ceremoniously ripped the injunction in two."⁴⁷ And, with that, Schwartz concluded that his effectiveness was at an end. The injunction, and his lawyerlike efforts in connection with it, were viewed as trickery "further compounding the feeling of mistrust which pervaded the yard."⁴⁸

A few hours after Schwartz bowed out, another lawyer, William Kunstler, made his entrance. Kunstler, as noted above, headed the list of observers requested by the inmates. By the time of his arrival during the late evening of the second day, it had become clear that the key to peaceful settlement and the return of the prisoners' hostages was their demand for amnesty.⁴⁹

At about 11:30 p.m. Kunstler and other members of a now assembled "observers committee" entered D-yard with three objectives: (1) to get a complete list of demands; (2) to ascertain the relative importance of these demands; and (3) to get the inmates' views on how they wanted the observers

⁴⁴*Id.* The complete text is reproduced in Wicker app. 2, at 317.

⁴⁵COMMISSION REPORT at 225.

⁴⁶*Id.* at 227.

⁴⁷*Id.* at 230.

⁴⁸*Id.* at 231.

⁴⁹*Id.* at 243.

to function.⁵⁰ During this session the observers listened to a number of inmate speeches and some, notably Kunstler, made speeches of their own. According to Tom Wicker's chronicle, Kunstler left no doubt where he stood:

"The presentation of Bill Kunstler was a [big] moment. A recognizable figure with his long hair and sideburns, his glasses characteristically pushed up on his high forehead, Kunstler took the microphone confidently and waited for the welcoming ovation of the inmates to die away.

" 'Palantel' he shouted, raising another roar. *All power to the people!*"⁵¹

During his speech Kunstler, according to Wicker, told the inmates "You have power, which means you can reach ears."⁵² Wicker, as well as other observers, interpreted this as a clear reference to the hostages. When he finished, one of the inmates asked Kunstler to become *their* lawyer, and he agreed.⁵²

After they left the yard, some of the observers were critical of Kunstler's agreement to act as the inmates' attorney. Others rose to his defense "pointing out that the confidence reposed in him by the inmates would facilitate a settlement and provide a mechanism for the advocacy of the inmates' position to the state."⁵⁴

Kunstler was to become highly instrumental in the development of the so-called "28-Points" which came to represent the State's final offer to the rebellious inmates.⁵⁵ These points covered, and in some instances elaborated, the prisoners' 15 demands with three notable exceptions—amnesty, transportation to "non-imperialist" countries and the removal of the prison superintendent.

The local prosecuting attorney, Louis R. James, had, despite the pleas of influential members of the observers committee, refused on principle to promise amnesty (or, more accurately, refused to assure the inmates of his intent to exercise his discretion not to prosecute for crimes committed by inmates during the uprising). He did, however, draft a letter promising the inmates that any criminal prosecutions that might arise out of the incident would be conducted fairly and non-vindictively, and that such prosecutions would be initiated only when "there is substantial evidence to link a specific individual with the commission of a specific crime."⁵⁶ In short, James' letter was a rather classic statement of the prosecutor's recognition of his responsibility to exercise his broad discretionary powers in fairness to the people he represents and to the potential defendants subject to his power. But based on their perception of the inmates' basic mistrust of legal institutions—especially those dependent upon the good faith of white, middle class

⁵⁰*Id.* at 244.

⁵¹WICKER at 76.

⁵²*Id.* at 78.

⁵³COMMISSION at 247.

⁵⁴*Id.*

⁵⁵The text is reprinted in WICKER app. 4, at 320-22.

⁵⁶COMMISSION REPORT at 248-49.

law enforcement officers—Kunstler and other lawyer members of the observers committee, including Schwartz, not only declined to recommend that the inmates accept this alternative to the demand for total amnesty, but argued that because of its potential inflammatory effect it should not even be read to the inmates. The earlier experience with the injunction seemed to underscore this view.

Ultimately, however, along with the 28 points, James' promise of prosecutorial fairness was read to the prisoners, but with no observers' recommendation of acceptance. It was characterized merely as a recitation of the best deal they (the inmates) could expect. The initial reaction of the inmates to the James letter was as predicted by Kunstler, and the 28 points suffered the same fate as Schwartz' injunction—torn up in a blast of rhetoric by a grandstanding inmate. At this point, the observers who had entered D-yard to present the proposed settlement feared for their lives and they credit Kunstler as their savior. As the mood turned ugly, Kunstler, whom the inmates trusted as their lawyer and political ally, rose to tell the angry mob that he too looked upon the 28 points and the James letter as the best they could expect. However, he told them, the decision was up to them and offered no further advice. He also told the inmates that a corrections officer, William Quinn, who had been attacked and injured during the initial takeover, had died, and did nothing to relieve the impression that all of the 1500 or so inmates who were participating in the uprising might be chargeable with murder because of his death.⁵⁷

Given the reception of the 28-points in D-yard, slim hope remained for a peaceful settlement of the uprising. The stage was set for the forcible takeover when last ditch efforts to persuade Governor Nelson Rockefeller to appear personally at the prison also failed.

During his final visit to D-yard Kunstler delivered a speech that, if anything, made a non-bloody settlement even more unlikely. For motives that are at best murky, he announced over the inmates' public address system, "There are four Third-world and African countries people across the street from this prison prepared to provide asylum for everyone that wants to leave this country from this prison."⁵⁸ According to the McKay Commission:

. . . Kunstler explained that he had in fact spoken with four members of the Black Panther party, who claimed to be conveying offers of asylum from representatives of African and Asian countries. However, Kunstler admitted, he had not spoken with representatives of any foreign countries, there was no one waiting across the street, and the Panthers' proposals were limited to providing asylum only after inmates had completed their sentences.

Kunstler testified that after he was off the microphone he explained this to a group of inmates who had expressed interest in flight and that when it

⁵⁷*Id.* at 266.

⁵⁸*Id.* at 290.

became clear that the offer was limited to inmates who had been released from prison, the interest quickly dissipated.⁵⁹

Tom Wicker, who was one of the observers present in D-yard at the time, reports more dramatically:

Kunstler then repeated Bobby Seale's version of why Seale had not returned to D-yard. "He walked out of this prison, although he wanted to see you, because he could not bring himself, as a black man, to come in here and tell you what The Man wanted you to do."

Wicker, listening, was growing uncomfortable. . . . [H]ere was Kunstler giving serious standing to the third-world flight proposition and putting forward as fact the questionable contention that Oswald had refused to let Bobby Seale return unless he would advocate acceptance of the 28 points. No one could calculate the net effect of these remarks or that of the effusive praise [that other observers] had heaped on [the inmates in D-yard]. But all of this was the sort of thing, surely, the inmates, *wanted* to hear. Was it what they *needed* to hear?⁶⁰

Wicker follows with the observation that:

The observers had said publicly that a massacre was in prospect unless something—Rockefeller's intervention, for example—happened. But they knew no such intervention was likely. Was it not therefore altogether probable that a massacre *was* going to take place, that there would be no amnesty and certainly no flights to the third world—just bloodshed and death? The only visible alternative was for the inmates to end the revolt and accept the 28 points. The choice finally lay with them, if the state would not yield. Was that not what the observers should have been telling the brothers?⁶¹

What followed is, of course, tragic history. Determining that a negotiated settlement was not possible, the authorities ordered an assault on D-yard the result of which was a retaking of the prison at the cost of ten hostages and twenty-nine inmates killed, three hostages and eighty-five inmates wounded.⁶²

THE TERRORIST AS A CLIENT—A QUESTION OF LIMITS

The nature of the lawyer's role in our society demands that he or she function within a system of law and legal institutions. The special relationship that exists between lawyer and client is a vital aspect of that system. The cornerstone of the relationship is trust reposed in the lawyer by the client, and upon that cornerstone rest reciprocal obligations owed to the client by the lawyer.

In the context of this discussion the question must be resolved whether any of the special incidents of the lawyer-client relationship attach when the

⁵⁹*Id.* at 290-91.

⁶⁰WICKER at 241.

⁶¹*Id.*

⁶²WICKER, at 314; COMMISSION REPORT app. D and E, at 496-506.

"client" is committing a violent crime. The preceding summaries of the Kirit-sis and Attica incidents reveal that in both cases the law enforcement authorities perceived the value of letting the terrorists proceed at least *as if* legal negotiations were involved. Neither Tony Kirit-sis nor the Attica inmates would trust the authorities with whom they were dealing, and to supply a foundation of trust the authorities invited (or at least welcomed) the intervention of lawyers. Since the authorities perceived some advantage flowing to them from an attorney-client relation, it would be improper for them later to deny that such a relation could exist in the circumstances. It seems that an attorney should be able to represent, as a client, a person who is engaged in an act of terrorism, and that recognition of this fact is important to the protection of the terrorist's victim(s).

However, to admit the existence of the relation (and its attendant obligations) is only a beginning. What is the extent and direction of the lawyer's obligation to his or her client? How can the representation of a terrorist client be reconciled with the lawyer's obligation, as both professional and citizen, to preserve the legal order and the lives of the hostages?

Canon 6 of the Code of Professional Responsibility says that "a lawyer should represent a client competently." Canon 7 admonishes a lawyer to "represent a client zealously within the bounds of the law." With regard to these provisions the Code recognizes two related but importantly distinct representational functions of advocate and adviser.⁶³ The limitations upon a lawyer's conduct on behalf of a client within each of these roles also are quite distinct. It is elementary that a lawyer may, in good conscience, advocate on behalf of a client what he might not otherwise advise, so long as he does so within those nebulous "bounds of the law."⁶⁴ Legitimate advocacy, of course, assumes the existence of a colorable, non-frivolous legal position asserted in a lawful manner for lawful purposes.⁶⁵ It follows from these considerations that a lawyer undertaking to act on behalf of active terrorists initially should do so only in an advisory capacity. In this capacity the first obligation of the lawyer is to bring the matter "within the bounds of the law" by convincing his client to seek to resolve his problems in a lawful way, and by assuring him of zealous, competent representation in that regard. So, too, would a terrorist be concerned for his personal safety should he surrender himself and his hostage, and herein lies the beginnings of legitimate advocacy—to protect the client from unlawful reprisals and to assure him of legal procedures.

However, persons who have gone so far as to take or use hostages for negotiating leverage are unlikely to respond positively to such advice. Indeed, a lawyer may reasonably conclude that if he tenders such advice he may be lumped by the client with his adversaries, thereby undermining his client's trust in him and, with that, making a peaceful resolution of the situation all

⁶³See ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-3 (1970).

⁶⁴DR 7-102. *Id.*, DR 7-102

⁶⁵EC 7-4 *Id.* EC 7-4.

the more difficult. For example, both Ruckelshaus and Wilson had past experience with Kiritsis and knew him to be suspicious, emotionally volatile and incredibly stubborn. Not only was he unlikely to be responsive to their urgings to surrender his hostage and to submit himself to legal process, such a suggestion could well have increased the risk of harm as revealed by the following testimony:

Prosecutor (P): Did you tell the Defendant of the potential legal consequences of his current acts?

Wilson (W): Did I tell him that they were going to put him in jail or shoot him or—

(P): Whatever—

(W): He knew they would shoot him and he told me he knew what he did—what he had done. So I did not tell him, other than—that guy is a human being that you are holding out there. I really didn't get on the subject because it was—I was a little bit afraid to do so frankly.

(P): Why?

(W): Well I didn't know what my client's reaction might have been.

(P): Okay. Did you tell the Defendant to release his hostage, give himself up and put trust in his government?

(W): I told him to be mindful of the fact that he had a human being and I got so very—I got so much—sort of adverse reaction out of that, that I didn't go on and I never told him to trust his government.

(P): What kind of adverse reaction did you get from him as to the fact that his victim was a human being?

(W): Well as I recall, he continued to refer to the fact that the blankety blank had done so many blankety blank things to him and he [Hall] had not considered his [Kiritsis] human side and he wasn't going to consider that man human.⁶⁶

Kiritsis, like the rebellious Attica inmates, was not to be moved by homilies on the Rule of Law.

There may be a point at which a lawyer must inform his client that he can no longer represent him because any further legal aid under the circumstances might place the lawyer in conflict with the law. Disciplinary Rule 7-102(A) (7) of the Code of Professional Responsibility warns a lawyer not to "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." The point is explicated in Ethical Consideration 7-5:

"[A lawyer] may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

⁶⁶Hearing Transcript at 710-11.

The examples furnished by the drafters of the Code are not particularly helpful in the present context since they contemplate a lawyer who secretly advises his clients how to violate the law and get away with it, or who accepts a retainer from an organization he knows to be operating unlawfully and "agrees in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities. . . ."⁶⁷ Professor Freedman points also to some ambiguity within the Code on this matter in that "when the client 'seeks to pursue an illegal course of conduct,' withdrawal from the case by an attorney is 'permissible' [*sic*] but not 'mandatory'."⁶⁸ Freedman concludes that "the words 'Counsel or assist' refer to an active kind of participation in the client's illegal act, going beyond merely giving advice about the law" and that "by making withdrawal permissible, the Code leaves the decision to the personal judgment of each attorney in all cases."⁶⁹

While I agree with this analysis it helps us only to conclude that lawyers in the positions of Wilson and Ruckelshaus need not terminate their attorney-client relationship because their client insists on carrying on with his criminal conduct. We are left with the problem of what they can do, beyond advising their client to cease and desist, without being found to have *counselled* or *assisted* him in conduct that is so obviously criminal. We may locate the outer reaches of the lawyer's permissible conduct at the point at which he would become an accomplice chargeable with the criminal acts of his client. Here, according to Judge Learned Hand: "It is not enough that [an aider and abetter] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote the venture himself, make it his own, have a stake in its outcome."⁷⁰ Since a lawyer's ethical standards must be higher than those that would permit him merely to say "I am not a crook," his activity on behalf of a terrorist client must cease well short of this outer limit.

I suggest the following general guideline: *A lawyer may counsel and negotiate on behalf of a terrorist holding hostages so long as his or her efforts are directed to a peaceful resolution of the matter and so long as the lawyer does not intentionally, knowingly or recklessly⁷¹ increase or prolong the danger to the hostages.* This rule limits the lawyer's advisory and representational acts and signals a point at which termination of the attorney-client relationship would become necessary to avoid disciplinary sanction, and perhaps even criminal responsibility. This standard tells the lawyer that he or she, when called upon in the kind of situations described earlier in this arti-

⁶⁷ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 281 (1952).

⁶⁸M. FREEDMAN, *supra* note 2 at 60.

⁶⁹*Id.*

⁷⁰United States v. Falcone, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 See also W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 506-08 (1972).

⁷¹These states of mind should be defined as in the American Law Institute, Model Penal Code § 2.02(2)

cle, is not limited to either declining any representation or merely advising the terrorist to give up his hostage(s) and surrender. Since, as noted above, the basic value of recognizing the attorney-client relationship is to bridge the gap of trust between the terrorist and the authorities, a certain amount of "breathing space" must be allowed.

Applications of the Standard

While the private lawyers in the Kiritsis case had no articulated standard by which to measure the propriety of their representation of their client, they seem instinctively to have conformed to the guideline suggested above. Wilson acted first as an intermediary through whom Kiritsis communicated his specific demands. Also, both Ruckelshaus and Wilson, having represented Kiritsis in the past, were able to inform the authorities that he was unlikely to accept any compromise—particularly as it related to immunity from prosecution. This information (confirmed by other sources) aided in developing the bargaining strategy of the authorities and, under the circumstances, did nothing to increase or prolong the danger to the hostage.

It was after the tender of the immunity promise in the emergency situation described above that the interaction of the prosecutors and Kiritsis' lawyers took on an adversarial coloration. During his meeting with Rimstidt, Ruckelshaus pressed him hard on the genuineness of the promise. The prosecutors had decided to carry out their bluff, and Ruckelshaus was attempting to preserve for his client a concession already made—not one that he had demanded on his behalf. It seems clear that Ruckelshaus understood that the promise not to prosecute Kiritsis for crimes relating to the Hall abduction was, at best, voidable and that it rested entirely on the good faith of the prosecutors. The advice that Ruckelshaus was to give to his client reveals his basic understanding that complete candor with Kiritsis would endanger the hostage. He told the prosecutors that he would tell his client that the promise of immunity was good *so long as the prosecutor continued to honor it!* This was correct as a matter of law, but was equivocal and incomplete.

Assume that X calls upon his lawyer and tells him: "Y agreed to pay me \$1,000 and I agreed in return not to set fire to his house. While I have not burned his house, Y refuses to pay me my \$1,000. How can I collect?" Surely the lawyer (before taking the client by the collar and showing him the door) would explain that such an agreement is not only unenforceable because of duress and absence of lawful consideration, but also that the actions of the client amount to a most blatant form of extortion. Ruckelshaus might similarly have informed Kiritsis that the prosecutor might feel in no way bound to honor a promise extracted by threats of murder and arson, and that the very act of demanding a written promise of immunity was itself a form of criminal extortion.⁷² However, had Kiritsis received this information

⁷²See IND. CODE § 35-17-5-14 (1976).

he may have become even more dangerous. Hence, Ruckelshaus' proposed advice, while incomplete, was appropriate both in terms of the attorney-client relationship and his obligation to preserve the safety of the hostage.

However, two other points must be examined before we may conclude that the lawyers' conduct complied fully with the proposed standard. First, Ruckelshaus insisted upon a condition not demanded by Kiritsis, i.e., that one of the prosecutors go on live TV to broadcast the promise of immunity to Kiritsis. Second, he claims that had he discovered the prosecutors' duplicity he would have so informed his client. The demand for the TV broadcast seems to have been motivated by two concerns (1) to make it more difficult for the prosecutors to repudiate the promise; and (2) by such a dramatic expression to make the promise seem genuine to Kiritsis. Since the prosecutors readily agreed to the condition, the demand neither increased nor significantly prolonged the danger to the hostage. Also, it was a method of confirming the trustworthiness of the lawyer—as if to say: "Tony, I've made these guys commit themselves in the most public way possible. If they back down on you they will have to take a lot of heat."

As to the threat to blow the whistle on any sham (e.g., the discarded plan to promise federal immunity by impersonating a federal official), Ruckelshaus seemed to be attempting to protect his own integrity. In other words, he was not to be made a party to a trick. But threatening to reveal the lie and actually revealing it are two different things. The threat did not increase or prolong the danger to the hostage. It merely required the authorities to play out their hand. However, actually revealing to Kiritsis that the promise of immunity was a sham would have seriously increased the homicidal risk. Therefore, had Ruckelshaus become overtly aware of the prosecutors' intention he would have been under an obligation *not* to tell his client. To disassociate himself from the prosecutors' actions, he might have had to withdraw then and there from any further participation in the case. Whether he would have been able to communicate his withdrawal to his client would have been largely up to the authorities who controlled the lines of access.⁷³

Wilson's efforts regarding the \$5 million promissory note seem closely similar to those of Ruckelshaus with respect to the immunity agreement. In essence he was, perhaps less confidently than Ruckelshaus, attempting to walk the thin line between an obligation to a client and a public duty. Wilson's insistence (supported by Ruckelshaus) that the "agreement" be signed by an officer of the mortgage company avoided his having to consciously mislead his client. However, this activity was taking place while Kiritsis was holding his

⁷³Except for the press. Kiritsis was monitoring TV and radio coverage and presumably he could have been reached through either electronic medium. Even if his electricity were to have been cut off he may have had a battery operated radio.

so-called "news conference" and a longer delay than was actually experienced could have had serious consequences.

The actions of the private lawyers in the Kiritsis case were close to the edge, but within the ethical standard suggested above. They did not seek out their difficult assignments but were brought in at the request of the authorities. To their credit they did not refuse to become involved and seem admirably to have discharged their conflicting obligations to client and to public.

While the dynamics of Attica (as well as the stakes) were different, the standard for measuring the lawyers' ethical behavior is the same. Perhaps it is because William Kunstler has made no pretense of divorcing his political ideology from his professional role that his conduct *as a lawyer* at Attica deserves lower marks. He did, of course, provide the vital linkage of trust between the rebellious prisoners, and the New York authorities. However, at two critical points he seemed actually to encourage the lawless action of his clients. The first was during his initial appearance in D-yard when he made an unmistakable reference to the bargaining leverage the prisoners had through their hostages. While it may have been useless to urge them to give up at that point, this reinforcement of their intention to use the hostages as bargaining points came very close to encouragement of their criminal activity. The second and even more reckless statement came near the end when he broadcast to the inmates in D-yard that certain "third-world" countries were ready to provide transportation out of the United States. This untrue statement could only have been calculated to discourage a settlement (i.e., the 28-points) that even Kunstler apparently believed was the best the prisoners could get. At that point it was clear to outside observers that it was either that settlement or deadly force. That is not only what they *should* have been told at that point, but what a competent lawyer less affected by his own political ideology and radical image must necessarily have told his clients.

I do not suggest that Kunstler's action (or nonaction) was the factual cause of the succeeding events. I measure his conduct only by an ethical standard that does not depend upon a cause and effect relationship. It is the lawyer's conduct alone that is to be scrutinized. Did he *risk* the increase or prolongation of the danger to the hostages? If so, his conduct as a lawyer was below standard. This is not meant as a pronouncement of guilt or a demand for sanctions. In other ways Kunstler acted quite nobly at Attica. But the example of his conduct as well as that of Ruckelshaus and Wilson must be kept in mind by lawyers in the future who will, unfortunately, find themselves faced with similar choices.